IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 385

STATE OF CALIFORNIA, *Petitioner,*

vs.

HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, WILLIAM J. LANGSTON AND H. C. GREER, *Respondents,*

AND

L. B. FEE, ET AL., ETC., ET AL., *Respondents.*

BRIEF OF RESPONDENTS HARRY TAYLOR, PETER A. CALUS, JAMES W. BREWSTER, WILLIAM J. LANGSTON AND H. C. GREER IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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September 27, 1956.

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STATEMENT OF THE CASE.

These respondents find no misstatements in the Statement of the Case in the Petition for a Writ of Certiorari (Petition, pp. 4-9). However, these respondents believe that the second paragraph of page 4 of the Petition may give the impression that the entire Civil Service System of the State of California is involved in this suit.

Such is not the case. The present litigation concerns the applicability of the Railway Labor Act to the State Belt Railroad of California, which is owned and operated by that State (R. 6). The Record does not disclose that the State so owns or operates any other railroad. The lines of the State Belt Railroad extend along the water front of San Francisco harbor (R. 6). It has in its service from 125 to 150 employees, included among whom are locomotive firemen and engineers and trainmen (R. 6-7). The collective bargaining agreement affected in this suit is that made on behalf of the crafts of locomotive firemen, of locomotive engineers, and of trainmen. There is no showing in the Record that any other employees of the State Belt Railroad have a collective bargaining agreement.

Nor does the Record disclose that the State of California owns other commercial or industrial enterprises that will be affected by Federal laws similar to the Railway Labor Act and which may therefore concern the Civil Service System of the State of California.

ARGUMENT.

WHY THE WRIT SHOULD NOT BE GRANTED.

A. Conflict Between Seventh and Fifth Circuits and California Supreme Court.

The Petitioner, California, relies on the conflict between the decision of the California Supreme Court, on the one hand, and the decisions of the Seventh Circuit and of the Fifth Circuit, on the other hand, as a basis for the granting of the writ of certiorari (Petition, p. 10).

Such a conflict is not listed in Rule 19 of this Court among "the character of reasor which will be considered" pertaining to the exercise by this Court of its discretion.

Further, it should be observed that this Court denied the petition for writ of certiorari in the California Supreme Court case in *Brotherhood of Railroad Trainmen* v. *State of California,* 342 U. S. 876, 96 L. ed. 658. In commenting on this denial of the writ the Fifth Circuit said in *New Orleans Public Belt R. Com'n* v. *Ward,* 195 F. 2d 829, in note 2 appearing at the bottom of page 830:

> "* * * Moreover, the California Supreme Court's decision was based in part on a non-federal ground. 37 Cal. 2d 412, 232 P. 2d 857, 863. The United States Supreme Court has consistently adhered to the principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. Murdock v. Memphis, 20 Wall. 590, 636, 22 L. Ed. 429; Berea College v. Kentucky, 211 U. S. 45, 53, 29 S. Ct. 33, 53 L. Ed. 81; Fox Film Corp. v. Muller, 296 U. S. 207, 56 S. Ct. 183, 80 L. Ed. 158; Herb v. Pitcairn, 324 U. S. 117, 125-126, 65 S. Ct. 459, 89 L. Ed. 789."

These Respondents therefore urge that conflict between the Seventh and Fifth Circuits and the California Supreme Court affords no reason for the granting of the writ of certiorari.

B. Importance of the Issues.

1. In stating in its Petition its idea of the Questions Presented (Petition, pp. 2-3) California thus puts the first question:

> 1. "Whether Congress intended the general provisions of the Railway Labor Act (45 U. S. C. s. 151 *et seq.*), providing for collective bargaining and enforcement of collective bargaining contracts in interstate railroad commerce, to apply to a State?"

California discusses this point at pages 10-13 of its Petition.

At pages 10 and 11 of its argument California declares:

> "* * * the Seventh Circuit's discovery in the general language of section 1 of the Railway Labor Act of an intention to require the State to displace its present procedures and collectively bargain with its Belt Line employees has a potentially far-reaching impact on the administration of State government."

As these Respondents have already observed in their Statement of the Case, this litigation concerns only locomotive firemen, engineers, and trainmen of a Railroad which employs no more than some 125 to 150 persons. California itself refers to the Railroad as "a local switching railroad" (Petition, p. 18). It is difficult to believe that action taken in this suit with respect to such a relatively small number of employees of a small railroad which appears to be the only one owned or operated by California "has a potentially far-reaching impact on the administration of State government."

There has been no showing in the Petition that California owns or operates any other businesses which will be affected by the application of the Railway Labor Act to the State Belt Railroad or that such application will upset "the administration of State government" or wreck the entire Civil Service System of California.

In this connection it is interesting to note that the holding of this Court that California in its operation of the State Belt Railroad is subject to the Federal Safety Appliance Act (*United States* v. *California*, 297 U. S. 175, 80 L. ed. 567), and the holding of a California court that the Railroad is subject to the Federal Employers Liability Act (*Maurice* v. *State of California*, 43 Cal. App. 2d 275, 110 P. 2d 706), and the holding of the Ninth Circuit that the Railroad is subject to the Federal Carriers Taxing Act (*State of California* v. *Anglim*, 129 F. 2d 455) do not appear to have had any "far-reaching impact on the administration of State government."

These respondents suppose that at some future time a case will arise in which the exercise by the Congress of its constitutional power to regulate commerce is shown to cause serious interference with the administration of State government. These respondents would have no objection to the granting of the writ of certiorari to resolve such a question. But these respondents believe that they would have to be alarmists indeed to see with California that the decision sought to be reviewed "has a potentially far-reaching impact on the administration of State government." Certainly the Petition now under consideration, with its application limited to a few employees of a small railroad which appears to be the only California railroad in such a position, is not an appropriate vehicle for a decision of the nature suggested.

2, 3 and 4. At page 3 of its Petition California thus

states the second, third and fourth questions which it believes to be presented:

> "2. If the Act applies to a State operated railroad, whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship?
>
> 3. Whether the contract enforcement procedures invoked herein against a State, are prohibited by the Eleventh Amendment to the United States Constitution?
>
> 4. Whether the Railroad Adjustment Board can be ordered to make awards under a collective bargaining contract, which is in conflict with and violates the civil service laws of California?"

In its argument on "Importance of the Issues" California discusses these questions at pages 13-16 of its Petition.

None of these three questions was passed on by the Seventh Circuit, or, for that matter, by the District Court. To quote from page 8 of the Petition:

> "It will be noted that the District Court did not pass upon the issue of constitutionality, the bar of the Eleventh Amendment, the invalidity of the contract because it violated California civil service laws, • • • the Circuit Court treated all these important and decisive issues as waived (App. A, p. 17)."

In discussing this waiver, the Seventh Circuit, as set forth at pages 17-18 of the Appendices of the Petition, declared:

> "Under the heading 'position of State of California on other issues', the state contends *inter alia* that, if the contract is valid and may be enforced, the authority of the Adjustment Board to decide the instant claims is precluded by the provision in the contract that a system board—the State Personnel Board—shall hear and decide these claims (citing 45 U. S. C. A. § 153—Second). In its brief herein the state makes no further reference to this contention ignoring it in

its 'summary of argument', 'propositions of law relied on and citations of authorities' and in the body of its argument. (See rule 16 of this court referring to the contents of briefs.) No reference thereto was made in oral argument before this court. Under these circumstances we treat this contention as waived. For the same reason we consider as waived in this court the contentions of the state set forth in the footnote.[17]

The Seventh Circuit correctly held that California had waived the three above listed points which it now asks this Court to decide. In the appeal which these respondents took from the District Court to the Seventh Circuit it behooved California to assert all of its defenses against the plaintiffs' (respondents') action that it had asserted before the District Court. This is true for the simple reason that if the Seventh Circuit disagreed with and overruled the one ground upon which the District Court had predicated its decision dismissing plaintiffs' complaint, to-wit, the plea of *res judicata*, California's remaining defenses against plaintiffs' action would have been before the Seventh Circuit for consideration and decision.

The rule that an appellee may urge any matter appearing in the record in support of the decree appealed from, even though the appellee's argument involves reliance on a matter ignored by the lower court, was recently referred to by the Seventh Circuit in *Gallaher & Speck, Inc.* v. *Ford*

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17. "* * * (c) If the Railroad Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a state's relationship with its employees. (d) The contract is also invalid because the Harbor Board lacked authority to negotiate terms of the contract in conflict with the State Constitution and civil service laws. * * * (f) If, nevertheless, the Adjustment Board does have jurisdiction over these claims the Board should not be required to render awards because such awards could not be enforced against the State of California in the Federal courts as the Railway Labor Act provides, because of the inhibition of the Eleventh Amendment of the United States Constitution."

Motor Company, 226 F. 2d 728. At page 731 of its opinion the Seventh Circuit said:

> "Though the district court does not seem to have relied on the effect of the War Powers Act and the President's proclamation, defendant is entitled to rely upon same in support of the judgment below. As the Supreme Court said, in *United States* v. *American Ry. Express Co.*, 265 U. S. 425, at page 435, 44 S. Ct. 560, at page 564, 68 L. Ed. 1087; '* * * it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'"

See also:

United States v. *American Railway Express Co.*, 265 U. S. 425, 68 L. ed. 1087.

Morley Construction Co. v. *Maryland Casualty Co.*, 300 U. S. 185, 81 L. ed. 593.

But this California did not do. It sought instead to concentrate upon sustaining the ruling of the District Court based on the plea of *res judicata*. California did not continue to assert by argument and brief its defenses that if the Railway Labor Act is held to be applicable to the State of California, then the Act is an unconstitutional interference with a State's relationship with its employees, or its defenses based on the Eleventh Amendment, or that the State Belt Railroad lacked authority to make a collective bargaining contract which is in conflict with California laws, and that the National Railroad Adjustment Board therefore cannot be ordered to make awards under such a contract.

Thus California waived these defenses. As the Seventh Circuit said in *Hubshman* v. *Louis Keer Shoe Co.*, 129 F. 2d 137, at page 142:

> "Several other questions as to the court's refusal to receive certain evidence, etc., are mentioned in the brief. The matters are not argued and no authorities were cited to sustain plaintiffs' suggestion of error, and we consider the points waived if they had any merit."

To the same effect is:

Southeastern Express Company v. *Robertson*, 264 U. S. 541, 542, 68 L. ed. 840, 841.

Of course the writ of certiorari will not issue merely to accord another hearing to the party defeated in the Court of Appeals. As this Court said in *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163, 67 L. ed. 922, 924:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing. Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

Inasmuch as California has only itself to blame for the fact that the Seventh Circuit did not pass on the three questions which it now wishes this Court to resolve, no reason occurs to these respondents to prevent the application of the usual rule to California, namely, that the questions which the petitioner seeks to have this Court consider must have been duly raised and considered in the court below. This Court thus stated the rule in *New York Dock Co.* v. *Steamship Poznan*, 274 U. S. 117, 123, 71 L. ed. 955, 959:

> "Respondent attempts to raise here questions with respect to the amount of recovery which were neither raised nor considered below. We have examined them only so far as is necessary to ascertain that no error was committed by the district court so plain or apparent as to warrant our consideration on such a state of the record."

Again, this Court said in *Calmar Steamship Corp.* v. *U. S.*, 345 U. S. 446, 456, 97 L. ed. 1140, 1147:

> "We do not consider the merits of Calmar's claims against the United States, which the Court of Appeals did not, in view of its disposition of the libel, pass on."

Finally, the petition for a writ of certorari in a case may raise important questions but the record may be cloudy, and it may be desirable to have different aspects of an issue further illumined by the lower courts. As this Court said in *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917-918, 94 L. ed. 562, 565-566:

> "A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. This is especially true of petitions for review on writ of certiorari to a State court. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a State court of last resort; the decision may be supportable as a matter of State law, not subject to review by this Court, even though the State court also passed on issues of federal law. A decision may satisfy all these technical requirements and yet may commend itself for review to fewer than four members of the Court. Pertinent considerations of judicial policy here come into play. A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening."

The inaction of California in the Seventh Circuit has resulted in a "cloudy" Record which does not entitle California to the granting of a writ of certiorari.

Inasmuch as questions 2, 3, and 4 were not urged to or considered by the Seventh Circuit, this Court need not grant its writ to pass on them at this time.

C. Whether Decisions Pertaining to the Application of Other Federal Statutes to the State Belt Railroad Are Determinative.

As a final reason for the granting of the writ of certiorari, California is forced into the negative approach of attempting to show that earlier decisions concerning the State Belt Railroad, including a decision by this Court, have not already established that the Railroad is subject to the Railway Labor Act. To quote from page 16 of California's petition:

> "C. DECISIONS PERTAINING TO THE APPLICATION OF OTHER FEDERAL STATUTES TO THE STATE BELT RAILROAD ARE NOT DETERMINATIVE.
>
> "Because Federal statutes concerning safety appliances (*U. S.* v. *California*, 297 U. S. 175); rules of tort liability (*Maurice* v. *California*, 43 Cal. App. 2d 275, 110 P. 2d 706) and taxes (*California* v. *Anglim* (9th Cir.), 129 F. 2d 455) have been held to apply to a State as well as private carriers, it does not follow that all Congressional assertions of the commerce power can be applied against a State."

The Petition fails to state that each of these decisions concerned the State Belt Railroad, the very carrier which is the subject of the present suit.

In holding the Railroad subject to the Federal Safety Appliance Act this Court said in *U. S.* v. *California*, 297 U. S. 175, 189, 80 L. ed. 421:

"2. The state urges that it is not subject to the federal Safety Appliance Act. It is not denied that the omission charged would be a violation if by a privately-owned rail carrier in interstate commerce. But it is said that as the state is operating the railroad without profit, for the purpose of facilitating the commerce of the port, and is using the net proceeds of operation for harbor improvement, see Sherman v. United States, 282 U. S. 25, 75 L. ed. 143, 51 S. Ct. 41, supra; Denning v. State, 123 Cal. 316, 55 P. 1000, it is engaged in performing a public function in its sovereign capacity and for that reason cannot constitutionally be subjected to the provisions of the federal Act. In any case it is argued that the statute is not to be construed as applying to the state acting in that capacity.

"Despite reliance upon the point both by the government and the state, we think it unimportant to say whether the state conducts its railroad in its 'sovereign' or in its 'private' capacity. That in operating its railroad it is acting within a power reserved to the states cannot be doubted. See Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 624, 78 L. ed. 1025, 1029, 54 S. Ct. 542; Green v. Frazier, 253 U. S. 233, 64 L. ed. 878, 40 S. Ct. 499; Jones v. Portland, 245 U. S. 217, 62 L. ed. 252, 38 S. Ct. 112, L. R. A. 1918C, 765, Ann. Cas. 1918E, 660. The only question we need consider is whether the exercise of that power, in whatever capacity, must be in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce. United States v. Louisiana, 290 U. S. 70, 74, 75, 78 L. ed. 181, 184, 185, 54 S. Ct. 28; Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 42 S. Ct. 232, 22

A. L. R. 1086; Shreveport Rate Cases (Houston, E. & W. T. R. Co. v. United States), 234 U. S. 342, 58 L. ed. 1341, 34 S. Ct. 833. A contract between a state and a rail carrier fixing intrastate rates is subject to regulation and control by Congress, acting within the commerce clause, New York v. United States, 257 U. S. 591, 66 L. ed. 385, 42 S. Ct. 239, as are state agencies created to effect a public purpose, see Sanitary Dist. v. United States, 266 U. S. 405, 69 L. ed. 352, 45 S. Ct. 176; University of Illinois v. United States, 289 U. S. 48, 77 L. ed. 1025, 53 S. Ct. 509; see Georgia v. Chattanooga, 264 U. S. 472, 68 L. ed. 796, 44 S. Ct. 369. In each case the power of the state is subordinate to the constitutional exercise of the granted federal power."

This Court has already so thoroughly established the principle that the State Belt Railroad is subject to Federal law that the question of whether the Federal Railway Labor Act applies to the Railroad affords no reason to grant the writ of certiorari in the present case.

CONCLUSION.

The conflict between the Seventh and Fifth Circuits, on the one hand, and the California Supreme Court, on the other, affords no support for a petition which seeks a review of the Seventh Circuit decision.

The application of the Railway Labor Act to the California State Belt Railroad is not shown to have a far-reaching effect on the administration of State government, and presents no important issue.

The questions of whether Congress has the constitutional authority in the manner of the Railway Labor Act to control a State's employer-employee relationship, of whether the Eleventh Amendment prohibits the contract enforcement procedures and of whether the National Railroad Adjustment Board can be ordered to make awards under a collective bargaining agreement which is in conflict with

the civil service laws of California were not argued to or considered by the Court of Appeals, and therefore need not be considered by this Court.

Decisions pertaining to the application of other Federal statutes to the State Belt Railroad, including particularly the decision of this Court that the Railroad is subject to the Federal Safety Appliance Act, are determinative that the Railroad is subject to the Railway Labor Act.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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